Supreme Court, U.S.
FILED

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No. 07-_____

In The
Supreme Court of the United States

JOANNA BAIDA,

Petitioner,

v.

FIRST UNUM LIFE INSURANCE COMPANY;
DIVERSIFIED AGENCY SERVICES
GROUP BENEFIT PLAN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRITT OF CERTIORARI

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QUESTION PRESENTED

Whether the existence of a conflict of interest arising from a plan administrator's dual role as claim decision-maker and payor of benefits under an employee benefit plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq., alters the abuse of discretion standard of judicial review where the plan confers discretion on the administrator to determine eligibility for benefits and interpret the terms of the plan?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joanna Baida respectfully petitions for a writ of certiorari to review the decision of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the U.S. Court of Appeals for the Ninth Circuit (App. 1-6) is found at 2007 WL 4467637 (9th Cir. Dec. 20, 2007). The Ninth Circuit denied rehearing on February 13, 2008 (App. 17.) The orders of the district court are found at pages 7 through 16 of the Appendix.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its decision on December 20, 2007, and denied rehearing on February 13, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132, as amended, provides in relevant part:

(a) A civil action may be brought –

(1) by a participant or beneficiary –

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

1. This case raises the frequently litigated but unresolved issue of the proper standard of judicial review of a benefits claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), where a plan administrator that has been granted discretion by the plan terms both decides the claim and, if it determines the claim is payable, pays the benefits from its own funds. This Court recently granted certiorari on the two components of this issue: (1) whether such an administrator acts under a conflict of interest; and (2) if it does, how that conflict of interest should be taken into account on judicial review of the benefits claim. *MetLife v. Glenn*, 128 S. Ct. 1117 (2008) (hereinafter "*Glenn*").

2. ERISA does not prescribe a standard of review for benefits claims under Section 502(a)(1)(B). In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that the default standard of judicial review of such a claim is de novo. *Id.* at 115.

However, where the terms of a plan confer discretion on the plan fiduciary to interpret the plan terms or determine eligibility for benefits, judicial review is for abuse of discretion. *Id.* In reviewing for abuse of discretion, courts must take into account any conflict of interest affecting the fiduciary. "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone*, 489 U.S. at 115 (quoting Restatement (Second) of Trusts, § 187, Comment d (1959)). More recently, this Court explained, "In *Firestone Tire* itself, we noted that review for abuse of discretion would home in on any conflict of interest on the plan fiduciary's part, if a conflict was plausibly raised. . . . It is a fair question just how deferential the review can be when the judicial eye is peeled for conflict of interest." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 384 n. 15 (2002).

3. Ms. Baida was covered as a participant in the Respondent Diversified Agency Services Group Benefit Plan ("the Plan") by reason of her employment with Porter Novelli, a public relations division of Diversified Agency Services. The Plan is insured and administered by Respondent First Unum Life Insurance Company ("Unum"). Ms. Baida began receiving long-term disability benefits from Unum under the Plan in September 2000, after she left work due to systemic lupus erythematosus, a chronic autoimmune system disease. Unum terminated Ms. Baida's

benefits in June 2002 and upheld this determination on Ms. Baida's appeal. Ms. Baida filed suit under Section 502(a)(1)(B) to reinstate the benefits.

The district court reviewed Unum's decision for abuse of discretion. (App. 7-14.) Applying the standard of *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995), the court held that although Unum operated under an inherent conflict of interest as the insurer and administrator of the Plan, Ms. Baida had failed to point to "material, probative evidence . . . tending to show" that Unum's conflict of interest had affected its decision on her claim. (App. 12-13.) Following a trial on the administrative record, the court determined that Unum had not abused its discretion in denying benefits. (App. 16.)

The Ninth Circuit affirmed. (App. 1-6.) The court noted Unum's "inherent, structural conflict of interest of both making decisions on claims and paying claims with its own funds," but held that the "existence of such a conflict does not change the district court's abuse of discretion standard of review." (App. 2.) The circuit court recognized that the district court's decision in this case pre-dated *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc), which overruled the *Atwood* standard applied by the district court. (App. 5.) However, the court held that the district court's abuse of discretion review was sufficient under *Abatie* because "Baida has not shown material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that Unum's self interest caused a breach of the administrator's

fiduciary obligations to Baida." (App. 5 (citing *Alford v. DCH Found. Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir. 2002) (applying *Atwood*))). Finally, the court expressed its view that the district court had considered Unum's conflict at the summary judgment stage, implying that the district court was not required to consider the conflict at the trial stage. (App. 5.)

The Ninth Circuit denied Ms. Baida's petition for panel rehearing. (App. 7.) This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Standard of Review of Decisions by Conflicted Administrators Is a Significant and Recurring Issue That Has Generated Pervasive Confusion and Conflicting Results in the Lower Courts.

As the United States has demonstrated in its brief in *Glenn*, since *Firestone*, the circuit courts have split on two questions: (1) whether an administrator operates under a conflict of interest when it both decides claims and pays those that it approves; and (2) if a conflict exists under these circumstances, how to weigh the conflict in determining whether the fiduciary has abused discretion conferred on it by the plan. *See* Brief for the United States as Amicus Curiae in *MetLife v. Glenn*, 2007 WL 4613628, at *5 (filed Dec. 21, 2007) (hereinafter *Glenn* U.S. Brief). As noted above, this Court recently granted certiorari in

Glenn on both these questions. *Glenn*, 128 S. Ct. at 1117.

This case illustrates the confusion and conflict in the lower courts on these questions. While the Ninth Circuit acknowledged that Unum operated under an "inherent, structural conflict of interest," it placed the burden on Ms. Baida to show "material, probative evidence, *beyond the mere fact of the apparent conflict*," tending to show that the conflict affected Unum's decision on her claim. (App. 5 (emphasis added).) The circuits have reached contrary results as to whether such evidence is required to trigger consideration of a conflict of interest in reviewing the decision of an administrator with discretion. *See Glenn* U.S. Brief, 2007 WL 4613628, at *7-*9 (collecting cases). Because the court below required this showing, its decision conflicts with those of other circuits holding that a conflict of interest must be taken into account in every case where the claim decision-maker also must pay the claims it approves. *See id.* at *7 (collecting cases); *see also Abatie*, 458 F.3d at 969 (holding that conflict should be considered even in absence of "smoking gun" evidence). Certiorari should be granted to establish a uniform standard for reviewing the decisions of such "dual-role" plan administrators. *See Glenn* U.S. Brief, at *9 (stating that "the circuits are clearly in disarray on the issue"); *Glenn*, 128 S. Ct. at 1117.

II. The Standard Applied by the Ninth Circuit Is Contrary to *Firestone* Because It Fails to Weigh a Conflict of Interest as a Factor in Determining Whether an Abuse of Discretion Occurred.

Decisions like the one below directly conflict with this Court's decision in *Firestone* by placing on the plan participant a burden to show the effect of an administrator's conflict of interest on the handling of the participant's claim. As noted above, in *Firestone*, this court held that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, *that conflict must be weighed*" as a factor in determining whether there is an abuse of discretion. *Firestone*, 489 U.S. at 115 (emphasis added). Yet the court below and the First, Second, Sixth, and Seventh Circuits fail to weigh the conflict unless the participant shows that the conflict affected the decision on his or her claim. *See Glenn* U.S. Brief, at *8 (collecting cases).

Here, the court placed on Ms. Baida the burden to demonstrate the existence of evidence "beyond the mere fact of the apparent conflict." (App. 5.) That burden cannot be reconciled with the requirement of *Firestone* that a conflict of interest must be weighed in determining whether an administrator with discretion has abused that discretion. *See Abatie*, 458 F.3d at 966. Because a substantial minority of circuits enforce the requirement imposed on Ms. Baida below, certiorari should be granted to bring the law into

conformity with *Firestone* and ERISA's trust-law roots. *See Glenn* U.S. Brief, at *13-*16.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOANNA BAIDA, Plaintiff-Appellant, v. FIRST UNUM LIFE INSURANCE COMPANY; DIVERSIFIED AGENCY SERVICES GROUP BENEFIT PLAN, Defendants-Appellees.	No. 05-56923 D.C. No. CV-03-09345-GPS MEMORANDUM* (Filed Dec. 20, 2007)

Appeal from the United States District Court
for the Central District of California
George P. Schiavelli, District Judge, Presiding

Argued and Submitted December 4, 2007
San Francisco, California

Before COWEN**, HAWKINS, and N.R. SMITH, Circuit Judges.

Joanna Baida ("Baida") filed suit against First Unum Life Insurance Company, et al. ("Unum") pursuant to the Employee Retirement Security Act of

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

1974 ("ERISA"), claiming she is entitled to long-term disability benefits under the Diversified Agency Services Group Benefits Plan ("the Plan"). After a bench trial, the district court entered judgment in favor of Unum. Because the parties are aware of the facts of this case, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291. Reviewing de novo the district court's choice and application of the standard of review to decisions by fiduciaries in ERISA cases, *Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 797 (9th Cir. 1997), we affirm.

The Plan contains an unambiguous grant of discretion to the fiduciary or administrator of the Plan to determine a claimant's eligibility for benefits. The district court therefore correctly reviewed Unum's decision to deny Baida's claim for an abuse of discretion. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *see also Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (en banc).

Unum's inherent, structural conflict of interest of both making decisions on claims and paying claims with its own funds does not compel de novo review. The existence of such a conflict does not change the district court's abuse of discretion standard of review. *See Firestone*, 489 U.S. at 115; *Abatie*, 458 F.3d at 967-68.

Baida's allegation of procedural violations also does not change the abuse of discretion standard of

review. *See Abatie,* 458 F.3d at 971. Courts should review de novo an administrator's decision to deny benefits "[w]hen an administrator engages in wholesale and flagrant violations of the procedural requirements of ERISA, and thus acts in utter disregard of the underlying purpose of the plan as well." *Id.* The record, however, demonstrates that Unum committed no "wholesale and flagrant" procedural violations that would have required the district court to review Unum's claims decision de novo.

The California Department of Insurance's ("CDI") "Letter opinion per CIC § 12921.9: Discretionary Clauses" and "Notice to Withdraw Approval and Order for Information" do not render the discretionary clause in the Plan unenforceable. An opinion letter "merely states the opinion of the insurance commissioner, and does not have the force of law." *Mixon v. Metropolitan Life Ins.,* 442 F. Supp. 2d 903, 908 (C.D. Cal. 2006) (citing *Baer v. Associated Life Ins. Co.,* 248 Cal. Rptr. 236, 238-39 (Ct. App. 1988)); *see also* Cal. Ins. Code § 12921.9(b) (An agency letter opinion is "*not* [to] be construed as establishing an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, rule, or *regulation,* as those terms are described in Sections 11340.5 and 11342.600 of the Government Code.") (emphasis added).

"Section 10291.5(b) sets forth the parameters within which the California Commissioner of Insurance may, in the exercise of her discretion, approve or disapprove insurance policies." *Firestone v. Acuson*

Corp. Long Term Disability Plan, 326 F. Supp. 2d 1040, 1050 (N.D. Cal. 2004); *see Peterson v. American Life & Health Ins. Co.,* 48 F.3d 404, 410 (9th Cir. 1995). That section does not grant beneficiaries the right to "reform the nature of his policy and obtain benefits for which he never bargained by engaging courts to second-guess the Commissioner's approval of the policy." *Acuson Corp.,* 326 F. Supp. 2d at 1050 (quoting *Peterson,* 48 F.3d at 410). "[S]ection 10291.5 does not enable plaintiff 'to maintain a private action against [the insurance company] to rewrite the terms of his policy'" and "does not empower this court to declare a certain portion of plaintiff's policy invalid or to unilaterally reform the terms and conditions of that policy." *Id.* (quoting *Peterson,* 48 F.3d at 410-11).

In addition, although the California Commissioner of Insurance may approve or disapprove insurance policies, the CDI's withdrawal of its approval of Unum's policy does not apply retroactively. *See Lundquist v. Continental Casualty Co.,* 394 F. Supp. 2d 1230, 1246-47 (C.D. Cal. 2005) (noting that "[v]irtually every court that has addressed the California [Department of Insurance's] Notice and its impact on the standard of review in ERISA cases has rejected the argument that the Notice entitles plaintiffs to a de novo standard of review" and that "the Notice does not purport to invalidate disability policies containing discretionary clauses retroactively") (internal citations omitted); *see also Mitchell v. Aetna Life Ins. Co.,* 359 F. Supp. 2d 880, 889 (C.D. Cal. 2005).

The district court correctly found that Unum did not abuse its discretion when it denied Baida's claim for benefits. The record shows that the district court allowed Baida and her counsel multiple opportunities to submit additional evidence, thoroughly reviewed and considered all new evidence, and conducted independent medical reviews of Baida's condition. Unum therefore engaged in an "ongoing, good faith exchange of information" with Baida. *See Jebian v. Hewlett-Packard Co. Employee Benefits Org. Income Prot. Plan*, 349 F.3d 1098, 1107 (9th Cir. 2003).

Abatie had not been decided at the time the district court made its decision here. The district court's review of Unum's decision, however, would have been sufficient under the more heightened, skeptical abuse of discretion review required by *Abatie*. *See Abatie*, 458 F.3d at 967-68 (holding that the abuse of discretion standard of review will be more skeptical when a conflict of interest or procedural violation is involved). Baida has not shown material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that Unum's self interest caused a breach of the administrator's fiduciary obligations to Baida. *See Alford v. DCH Foundation Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir. 2002). The district court also considered Unum's alleged conflict of interest when making its summary judgment decision.

Lastly, the district court did not err by adopting Unum's proposed findings of fact. A district court's adopted findings of fact are reviewed for clear error,

although "the wholesale and verbatim adoption of one party's findings requires us to review the record and the district court's opinion more thoroughly." *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006). The record demonstrates that the district court carefully considered the facts and circumstances of the case before adopting its findings of fact. Additionally, Baida has not demonstrated any clear error in the district court's factual findings. *Id.*

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
CIVIL MINUTES – GENERAL

Case No. CV 03-9345 GPS (CWx) Date: April 28, 2005

Title: Joanna Baida v. First Unum Life Insurance Company et. al.

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PRESENT: THE **HONORABLE GEORGE P. SCHIAVELLI**, JUDGE

Krista Barrett	Not present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not present	Not present

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

PROCEEDINGS: Plaintiff's Motion for Summary Adjudication on Standard of Review; Defendant's Motion for Summary Judgment (In Chambers)

The above entitled motions came before the Court on April 11, 2005. The Court heard argument and took the motions under submission. Having considered the pleadings as well as the arguments raised by counsel at the hearing, the Court orders as follows:

1) Plaintiff's motion for summary adjudication on standard of review is **DENIED**. In an ERISA denial

of benefits claim, the Court reviews an administrator's decision "under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility benefits or to construe the terms of the plan." *Kearney v. Standard,* 175 F.3d 1084, 1089 (9th Cir. 1999) *quoting Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 115, 103 L. Ed. 2d 80, 109 S.Ct. 948 (1989). Where the plan unambiguously provides the administrator with discretionary authority, the district court reviews the denial of benefits for abuse of discretion. *See Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995).

The Unum policy at issue contains a discretionary clause. That clause provides: "[w]hen making a benefit determination under the policy, UNUM has discretionary authority to determine your eligibility for benefits and to interpret the terms and provisions of the policy." Def's Statement of Uncontroverted Facts ¶ 7; Shea Decl. Exh. 1 UASP00044. The same language appears again in the plan's "Certificate of Coverage." Pl's Response ¶ 7; Shea Decl. Exh. 1 UASP00020.

It is undisputed that this language is sufficient to confer discretionary authority with the Unum administrator as contemplated in *Firestone*. Nevertheless, Plaintiff argues that the a *de novo* standard of review should apply because (1) the discretionary language is found in the certificate and not the policy itself; (2) discretionary clauses violation California law; and (3) Unum's decision was tainted by a conflict of interest.

a. Certificate Language

Plaintiff concedes that language conferring discretion is found in certificate. However, Plaintiff contends that because discretionary language does not also appear in the policy itself, the policy somehow contradicts the certificate. *See* Pl's Mot. Summ. J. 4: 9-18. The certificate states that "[i]f the terms and provisions of the certificate of coverage (issued to you) are *different* from the policy (issued to the policyholder), the policy will govern." Shea Decl. Exh. 1 UASP00044, (*emphasis added*).

Here, however, Plaintiff does not argue that the terms of the policy are different from the certificate. Instead, Plaintiff contends that policy is silent as to any grant of discretion and thus the policy's silence contradicts the discretionary language in the certificate rendering such language invalid. The Court disagrees. The certificate is clear in that terms of the policy prevail over terms of the certificate only if such terms are different. The Court is not persuaded by Plaintiff's argument that silence is equivalent to difference. Moreover, the Court finds the certificate language sufficient to give the employee adequate notice that the administrator has discretionary authority. Plaintiff points to nothing in the policy to suggest possible confusion or contradictory language. Thus, the language in the certificate is sufficient to confer discretionary authority to the administrator.

b. California Law

Plaintiff further argues that the Court should not apply an abuse of discretion standard because the Unum policy's discretionary clause violates California law. Pl's Mot. Summ. J. 21: 24-28. In support of this position, Plaintiff relies on a recently issued legal opinion by the Chief Counsel for the California Insurance Commissioner, which questions the validity of discretionary clauses under California law.

On December 5, 2003, Plaintiff's counsel, Teresa S. Renaker requested a letter opinion in an unrelated case pursuant to California Insurance Code § 12921.9. See Def's Request for Judicial Notice Exh. C. Specifically, Renaker asked whether discretionary clauses in disability insurance policies were "appropriate under California law." *Id.* The particular clause in question was the same Unum discretionary clause at issue in this case. *Id.*

On February 26, 2004, the Department issued a letter opinion stating that "all ... discretionary clauses in disability insurance contracts violate California law and deprive insureds of protections to which they are entitled." *See* Def's Req. J. Not. [sic] Exh. C. The letter opined that the mere presence of a discretionary clause renders the contract "unintelligible, uncertain, ambiguous, abstruse, and likely to mislead." *Id.* The Department further stated that it would "withdraw any approval of any disability forms known to contain such discretionary clauses"

pursuant to California Insurance Code §§ 10291.5(f) and 12957. *Id.*

One day later, on February 27, 2004, the Department issued a "Notice to Withdraw Approval" ("NWA") in which the Insurance Commissioner states that he "withdraws any approval of the forms listed [therein] for the reason that the forms contain Discretionary Clauses, "effective 91 days after the mailing of [the] notice unless, within 30 days of the mailing of [the] notice, an adversely affected insurer requests a hearing." *See* Def's Req. J. Not. [sic] Exh. D. The Department listed five insurers to which the NWA was directed, one of which was Unum Life Insurance Company Forms. *See Id.*

However, the NWA does not appear relevant to this proceeding because the Department's revocation of Unum policies is prospective only. *See Washington*, 2004 U.S. Dist. LEXIS 22975, 50-51 *citing Firestone v. Acuson Corp. Long Term Disability Plan*, 326 F. Supp. 2d 1040, 2004 U.S. Dist. LEXIS 12247 at *24 (N.D. Cal. July 2, 2004) (citing Cal. Ins. Code § 10291.5(f)). In other words, the NWA informs insurers that they may no longer sell a particular policy form; it does not effect policies already sold. See Def's Request for Judicial Notice Exh. E. The Unum disability policy at issue was sold long before the issuance of the February 27, 2004 NWA. Consequently, Plaintiff has not demonstrated that the Department's letter opinion requires the Court to apply de novo review in the case.

c. Conflict of Interest

Plaintiff argues that assuming the policy grants discretionary authority, Unum's decision was tainted by its financial conflict of interest, thus requiring the Court to conduct de novo review of the decision. *See* Pl's Mot. Summ. J. 6: 6-11. "[I]f a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Firestone Tire & Rubber Co.*, 489 U.S. at 115 *quoting* Restatement (Second) of Trusts § 187, Comment d (1959). The Court must apply "'heightened scrutiny' where the plan administrator has a conflict of interest by virtue of its economic stake in the benefit decisions which it makes." *Atwood v. Newmont Gold Co., Inc.*, 45 F.3d 1317, 1322 (9th Cir. 1995) *citing Watkins v. Westinghouse Hanford Co.*, 12 F.3d 1517, 1524 (9th Cir. 1993)).

An apparent conflict exists in this case because the insurance policy is both funded and administer [sic] by Unum. *See* Pl's Mot. Summ. J. 6-7: 28-5. However, "[t]he showing of a conflict does not automatically eliminate the usual deference accorded to the plan administrator; rather, the plaintiff must show 'that the conflict may have influenced the decision.'" *Alford v. Dch Found. Group Long-Term Disability Plan*, 311 F.3d 955, 957 (9th Cir., 2002) *citing Lang v. Long-Term Disability Plan of Sponsor Applied Remote Tech., Inc.*, 125 F.3d 794, 798 (9th Cir. 1997). "To make such a showing, the affected

beneficiary must come forward with 'material, probative evidence, beyond the mere fact of the apparent conflict, tending to show that the fiduciary's self interest caused a breach of the administrator's fiduciary obligations to the beneficiary." *Id.* (citations omitted).

Plaintiff points to a number of factors in support her contention that Unum was operating under a conflict of interest. Plaintiff argues, among other things, that the Unum neglected to follow its claim manuals and failed to give the proper weight to the opinions of Plaintiff's treating physicians. Plaintiff further argues that Unum's physician was biased and that Unum analyzed her ability to return to work under the wrong occupational title. However, these arguments do not persuade the Court that a conflict of interest may have influenced Unum's decision to deny benefits. Accordingly, the Court **DENIES** Plaintiff's motion for summary adjudication on the standard of review. Per the discretionary clause found in the policy at issue, the Court reviews the denial of benefits for abuse of discretion. *See Mongeluzo,* 46 F.3d at 944.

2) Defendant's motion for summary judgment is **DENIED**. The Court finds there to be triable issues as to whether the administrator abused its discretion in denying benefits to Plaintiff. As noted, the Court will apply an abuse of discretion standard and will therefore limit review to the record before the plan administrator when making the benefits determination. *Alford v. DCH Foundation Group Long-Term*

Disability Plan, 311 F.3d 955, 957 (9th Cir. 2002) *citing Taft v. Equitable Life Assurance Society*, 9 F.3d 1469, 1471 (9th Cir. 1993).

The Court trial, originally set for April 19, 2005, is hereby **continued to June 28, 2005 at 9:00 a.m.**

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION
CIVIL MINUTES – GENERAL

Case No. CV 03-9345 GPS (CWx)

Date: September 1, 2005

Title: Joanna Baida v. First Unum Life Insurance Company et. al.

==========

PRESENT: THE **HONORABLE GEORGE P. SCHIAVELLI**, JUDGE

Krista Barrett	Not present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Not present	Not present

PROCEEDINGS: Court Trial on Administrative Record (In Chambers)

The issue in this case is whether Plaintiff is entitled to long-term disability benefits under the Plan provided by her employer and insured by Defendant. Plaintiff filed a motion for summary judgment on the standard of review. The Court denied the motion concluding that the discretionary clause contained in Defendant's policy is sufficient to confer discretionary authority with the administrator. Accordingly, the Court reviews the denial of benefits on an abuse of discretion standard. *See Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995).

On June 28, 2005, the Court conducted a trial on the administrative record, at the conclusion of which the Court took the matter under submission. Having considered the evidence, as well as the arguments raised at trial, the Court finds that Defendant presented sufficient expert testimony to support its position that Plaintiff is not disabled under the terms of the Plan. While the Court has serious questions regarding whether Plaintiff is permanently disabled, the Court concludes that the administrator did not abuse its discretion in denying benefits. Accordingly, the administrator's decision must be affirmed.

Defendant is ordered prepare and submit proposed findings of facts, conclusions of law, and judgment not later than September 16, 2005.

Initials of Deputy Clerk /s/ KB

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOANNA BAIDA, Plaintiff-Appellant, v. FIRST UNUM LIFE INSURANCE COMPANY; DIVERSIFIED AGENCY SERVICES GROUP BENEFIT PLAN, Defendants-Appellees.	No. 05-56923 D.C. No. CV-03-09345-GPS Central District of California, Los Angeles ORDER (Filed Feb. 13, 2008)

Before: COWEN,* HAWKINS, and N.R. SMITH, Circuit Judges.

The Appellant's petition for panel rehearing is DENIED.

* The Honorable Robert E. Cowen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.